Immigration Law Update: Winter 2008

December 1, 2008

NEW FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION

On November 26, 2007, the U.S. Citizenship and Immigration Services (USCIS) published the revised Form I-9, Employment Eligibility Verification, in the Federal Register. The new form reduces the number of documents employers may accept for newly hired employees during the employment eligibility verification process consistent with changes made under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. All employers are required to complete a Form I-9 for each employee hired in the United States. Employers are given until **December 26, 2007** to transition to using the new form before being penalized for failing to do so.

NO-MATCH RULE STILL ON HOLD WHILE DHS SIMULTANEOUSLY DEFENDS AND REWRITES IT

The No-Match Safe Harbor Rule published earlier this year by the Department of Homeland Security (DHS) - which potentially makes significant changes to an employer's duties upon receipt of a Social Security No-Match letter - remains on hold indefinitely. DHS Secretary Michael Chertoff has announced DHS' appeal to the Ninth Circuit of the district court's decision to indefinitely block implementation of the No-Match Safe Harbor regulation issued August 2007.

The U.S. District Court for the Northern District of California had previously issued a restraining order against the DHS and the Social Security Administration to enjoin and restrain them from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." (AFL-CIO, et al. v. Chertoff, et al. (N.D. Cal. Case No. C 07 4472 CRB.) Just days before filing this appeal, DHS indicated that instead of defending the rule in district court, they would focus on rewriting the rule to address the concerns raised by business and labor groups that formed the basis of the injunction. Secretary Chertoff hopes that this dual approach will help expeditiously resolve issues and enable the rule to go into effect. Meanwhile, opposition groups like the American Civil Liberties Union have continued to roundly criticize DHS's approach to the No-Match rule.

THE O VISA: TEMPORARY WORK FOR "EXTRAORDINARY ABILITY"

The O-1 visa is a temporary work visa available to those foreign nationals who have "extraordinary ability in the sciences, arts, education, business or athletics." U.S. Citizenship and Immigration Services (USCIS) interprets the statute broadly to encompass most fields of creative endeavor, such as chefs, carpenters and lecturers. O-1 applicants must be coming to the U.S. to work in their field of ability.

To obtain an O-1 visa, applicants must demonstrate that they possess "a level of expertise indicating that the person is one of the small percentage who have risen to the top of the field of endeavor." There are two ways to demonstrate this expertise. One method is through receiving a major internationally recognized award such as the Nobel Prize. The more common way is by providing documentation in three of the following categories:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.
- Membership in professional associations that require outstanding achievements of their members.
- Published material about the alien.
- Participation as a judge of the work of others in the same or allied fields.
- Evidence of original contributions of significance in the field.
- Authorship of scholarly articles.
- Evidence of employment in a critical or essential capacity for organizations with a distinguished reputation.
- Evidence that the alien has or will command a high salary.

Comparable evidence that does not fit within these categories may also be submitted.

An O-2 visa can be obtained for those accompanying the O-1 visa holder who will assist O-1 aliens in their performance. To qualify for an O-2 visa, the applicant must meet the following requirements:

- Be an integral part of the actual performance.
- Have critical skills and experience that cannot be performed by others.
- In television and motion pictures, have a longstanding working relationship with the O-1 alien.

Evidence must be submitted to establish the O-2 applicant's essential role and that the applicant has skills and experience not possessed by an immediately available U.S. worker.

Before a person can be granted any O status, USCIS requires an advisory opinion from a peer group, labor union or person with expertise in the applicant's field. For O-1 applicants, this opinion can either state that the group has no objection to issuing the visa or can detail the applicant's achievements. Advisory opinions for O-2 applicants should outline the essential role to be played by the support personnel, as well as their relationship to the O-1 visa holder. It should also state whether there are available U.S. workers.

O applicants cannot sponsor themselves for the visa. Rather, the applicant's employer, agent or manager must file the application. The form for petitioning for an O visa is the I-129. This must be submitted along with the advisory opinion, evidence documenting the alien's extraordinary ability and details of the proposed work in the United States. The petition is filed at the USCIS Service Center with jurisdiction over the location of the employment.

An O visa may be granted for up to three years. It may then be extended in one-year increments for an indefinite period of time. The application for an extension does not need to include the advisory opinion. Accompanying spouses and children apply for O-3 visas and are subject to the same period of admission and limitations as the O-1 or O-2 beneficiary.

FAMILY-BASED IMMIGRATION

Immigration through a U.S. citizen or legal permanent resident family member is the most common way of gaining U.S. residency. All that is required is the qualifying family relationship. Qualifying relationships are grouped into two main categories: immediate relatives and preference relatives.

Immediate Relatives

Immediate relatives of U.S. citizens, including spouses, unmarried minor children and parents, do not need to wait for a visa number to become available once the petition is approved. They are also allowed to immigrate in unlimited numbers.

Preference Relatives

Preference relatives include unmarried adult children of citizens; spouses and unmarried children of permanent residents; married adult children of citizens; and siblings of citizens.

Visas for this group are subject to annual numerical limitations on immigration and limitations based on the family relationship. These relatives must wait for an immigrant visa number to become available according to the four preference categories.

The Application Process

Regardless of the type of beneficiary family member, the petitioning relative must complete Form I-130, Petition for Alien Relative, and include documentation of the qualifying family relationship and the petitioner's status in the United States.

If the application is for a spouse, it must include a copy of Form G-325A, Biographic Information, for the person filing and his or her spouse, and two color photos for each spouse.

If the application is filed for an immediate relative as described above, and the relative is in the U.S., an application for adjustment of status may be filed at the same time on Form I-485.

If the petitioner is in the U.S., the application is filed with the appropriate U.S. Citizenship and Immigration Services (USCIS) Service Center with jurisdiction over the petitioner's place of residence. If the petitioner is outside the U.S., he or she may file the application either with the USCIS Service Center that had jurisdiction over his or her last place of residence in the U.S. or with the overseas USCIS office that has jurisdiction over the petitioner's overseas residence.

If the petitioner is overseas on U.S. government business, the application is filed in the U.S. In some cases, a petitioner residing outside the U.S. may file the application with the U.S. consulate having jurisdiction over the petitioner's residence. However, not all U.S. consulates accept such petitions.

If the application is in order and is for an immediate relative, he or she can either adjust status or immediately apply for an immigrant visa at a U.S. consulate. If the alien is not an immediate relative, he or she must wait until a visa number becomes available to either adjust status or apply for an immigrant visa through the U.S. State Department and process the Green Card through a U.S. consulate overseas. In such cases, the priority date is the date on which the USCIS receives the complete application.

GROUNDS FOR ASYLUM AND REFUGE

Following World War II, the United States realized the need for comprehensive immigration laws for refugees. In 1965, a seventh preference immigration category was created that provides for the annual admission of 17,400 refugees. In almost every way, the requirements for refugee status and asylum are the same. The most important difference is that asylees apply while in the U.S., while refugees apply from both outside their home country and outside of the U.S.

To be considered a refugee or asylee, the person must have been persecuted or fear persecution on the basis of one of five grounds:

1. Race
There have been few cases dealing with this ground for refuge. These cases require proof a government either engaged in persecution or encouraged others to persecute someone because of his or her race. One factor that makes this ground difficult to prove is that the applicant must be singled out for persecution.

2. Religion
Persecution on the basis of religious beliefs is a much more common basis for asylum and refuge. Again, though, the applicant must prove that the persecution comes from a government or is motivated by a government. Discrimination or harm the applicant experiences that comes from individuals, even if it is due

to the applicant's religion, will not support the application unless there is proof that a government supports the activity.

3. Nationality
This is an infrequently used basis for asylum and refuge. Even if people in their country of residence harm members of a certain nationality, the applicants still must show that the government of that country either engaged in persecution or encouraged it, or that it is unwilling to provide protection. Also, if a country discriminates equally against all non-nationals, asylum cannot be granted.

4. Membership in a particular social group
Determining what constitutes a social group is the most litigated basis. Some courts have defined it to mean an identifiable group of people seen as a threat to the country from which they are seeking refuge. Others define it to encompass groups of people tied together because of a common characteristic that they cannot or should not be expected to change. The Board of Immigration Appeals defines a social group to be people who share a common, immutable characteristic, whether an innate part of their existence such as gender or a common experience such as military service. In recent years, this category has seen significant expansion, particularly in the area of persecution based on gender and sexual orientation.

5. Political opinion
This is the most often-used basis for an asylum or refuge application. In 1992, the Supreme Court significantly restricted this basis, ruling that the political opinion that matters is that of the victim, and that merely resisting government action is not enough to show persecution. Nor, according to the Board of Immigration Appeals, is being caught up in general civil unrest sufficient for a claim of asylum or refuge unless the government knows that the person disagrees with it politically.

One important development in this area is the idea of an imputed political opinion. In these cases, when it is obvious that a government is acting on the basis of what it believes to be an opposing political opinion, no evidence of the applicant's actual opinion or that the government knew it is required.

In 1996, Congress adopted a law making coercive family planning a form of persecution based on political opinion. Under this law, if individuals can show they were forced to terminate a pregnancy or be sterilized, they are deemed to have shown persecution on the basis of political opinion. There is an annual limit of 1,000 people who can be granted asylum on this basis.

REQUESTS FOR EVIDENCE

Each immigration application form includes the requirements for filing the particular petition. The application must include complete information in all the blocks, have the correct signatures, include the proper filing fee

and include the necessary evidence to adjudicate the case. If the application lacks the required initial evidence, U.S. Citizenship and Immigration Services (USCIS) may deny the incomplete application or issue a request for evidence (RFE).

The RFE is a written notice that is sent to the applicant detailing what necessary evidence must be sent to USCIS. If the applicant fails to respond to the RFE within the timeframe, the application can be denied.

Previously, applicants were given a deadline of 12 weeks from the date of the RFE to submit the requested evidence. However, as of June 18, 2007, USCIS adjudicators are allowed to set "flexible deadlines," which can be less than 12 weeks. Adjudicators are not allowed to set a deadline that allows the applicant more than 12 weeks to respond. RFE responses are considered to be filed timely if they are received by mail at USCIS no more than three days after the due date.

The "flexible deadlines" set by USCIS depend on factors such as the type of evidence requested, whether it is easily available and whether it is initial evidence or additional evidence. Sample deadlines outlined by USCIS include

- 30 days for the submission of initial evidence required by the form;
- 42 days for the submission of additional evidence available in the United States regardless of form type; and
- 84 days for the submission of additional evidence from overseas sources regardless of form type.

If an applicant does not respond to the RFE by the stated deadline, USCIS can

- find that the application or petition has been abandoned and, if so, deny it;
- deny the application or petition based on the evidence already received; or
- deny the application or petition for both reasons.

When responding to an RFE, the applicant must submit all the requested evidence together at one time, along with the original RFE notice. If the applicant submits only some of the requested evidence, USCIS will adjudicate the case based on the submitted evidence. There will not be another opportunity for evidence submissions.

Applicants for any immigration benefit are encouraged to submit complete applications. USCIS policy is to avoid issuing RFEs, since these requests are considered unnecessary burdens on USCIS resources and can delay case completion. Likewise, adjudicators are encouraged to conduct a thorough initial case review and should try to obtain the evidence from other USCIS records or readily available from external sources before issuing an RFE.

*If you have any questions regarding the topics covered in these articles or have other questions related to immigration law, please contact Mark Mathison or Casey Nolan.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.